IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION NO.879 OF 1998

For Approval & Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

---

1. Whether reporters of local papers may be allowed to see the judgment ?

2. To be referred to the reporters or not ?

3. Whether their lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

JAGDISHSINH JAYVANTSINH ZALA
VERSUS
STATE OF GUJARAT & ANR.

Appearance:
MR DJ BHATT FOR PETITIONER
MR SANDIP BHATT FOR RESPONDENT NO.2

Coram: MR.JUSTICE S.K. Keshote,J
Date of decision: 23/2/2001

C.A.V. JUDGMENT

#. Heard the learned counsel for the parties.

#. This petition under Article 227 of the Constitution by the husband of the respondent No.2 and challenge has been made therein to the judgment and order dated 10th September, 1998, passed by the learned Addl. Sessions Judge, Rajkot, in Criminal Revision Application No.89/98 confirming thereunder the order dated 15th June 1998 of 9th Joint Civil Judge (S.D.) and J.M.F.C., Rajkot, whereunder the said court issued search warrant u/s.97 of Cr.P.C. and directed to hand over the custody of the minor child Shailendra from the hands of the petitioner to respondent No.2.

#. It is unfortunate that because of this dispute between the spouses, the sufferer is the minor child. The learned counsel for the petitioner made manifold contentions and also cited decision of the Hon'ble Supreme Court but he is unmindful of one important legal aspect that sitting under Article 227 of the Constitution, it is not prerogative of this court to correct all species of hardship or wrong decisions. Their Lordships of the Supreme Court, in the case of Laxmikant R. Bhojwani v. Pratapsingh M. Pardesi, reported in 1995(6) SCC 576, held that the High Court is not justified in extending its jurisdiction under Article 227 of the Constitution in every case. Making reference to the Bombay Rents Hotel & Lodging House Rates Control Act, 1947, their Lordships observed that the Act is a special legislation governing the landlord-tenancy relationship and disputes. The legislature has, in its wisdom, not provided second appeal or revision to the High Court. The object is to give finality to the decisions of the Appellate Authority. The High Court, under Article 227 of the Constitution, what the Hon'ble Supreme Court said in that case, cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to the cases of grave dereliction of duty and flagrant abuse of fundamental abuse of law or justice where grave injustice will be done unless the High Court interferes. Even if it is taken to be true for the time being that the provisions of Section 97 of Cr.P.C. could not have been placed in service by respondent No.2 for taking custody of minor child, the learned trial court considered it to be a fit case to issue search warrant and which action of the learned trial court has been confirmed by the revisional court. Second revision has not been provided to this court which is clearly borne out from the provisions of section 397 of the Cr.P.C., meaning thereby, the Parliament has not considered it to be fit to provide second revision application against the order passed by the Sessions Court in its revisional jurisdiction so as

to give finality to the orders. In this case, the child is a minor and may be of the age below five years at the time when this action came to be taken by the Judicial Magistrate and in pursuance of that search warrant, if the custody of the child has been given to the mother, how any interference in this order is called for even if there may be any illegality therein, as what it is alleged by the learned counsel for the petitioner. In the matter of such dispute, the most important aspect of the matter and predominant consideration is the welfare of the minor child. If we go by the provisions of the Hindu Minor and Guardianship Act, I have no hesitation to say that upto a particular age, the custody of a minor child is to remain with the mother. Here, in this case, the child is of tender age and naturally the welfare of the child is in the custody of the mother. This what is a predominant consideration for the court in such matters and if we go by the same, it is a case where no interference of this court is called for under Article 227 of the Constitution. It is not a case where it can be said that if interference with the order of the court below is not made by the court, it will result in causing grave injustice to the petitioner. The petitioner has adequate efficacious remedy available for taking custody and for the guardianship under the other statute. That right will not be affected by this order passed by the court below. This is another ground on which no interference of this court is called for.

#. In the result, this special criminal application fails and the same is dismissed. Rule discharged. Interim relief, if any, earlier granted stands vacated. In the facts of this case, no order as to costs.

.....

(sunil)